
**PART B-1
TRADE SECRETS**

WAC

- 296-62-05305 Meet certain conditions if you withhold trade secret information.
- 296-62-05310 Reveal trade secret information when it is needed in order to treat a medical or first-aid emergency.
- 296-62-05315 Reveal trade secret information in nonemergency situations when requested by a health professional, employee, or designated representative.
- 296-62-05320 Deny a written request for disclosure of a specific chemical identity in the manner specified in this rule.
- 296-62-05325 Understand what is a trade secret.

WAC 296-62-05305 Meet certain conditions if you withhold trade secret information. You may withhold the specific chemical identity, including the chemical name and other specific identification of a toxic substance or hazardous chemical, from a disclosable record or a material safety data sheet if you meet each of the following conditions:

You:

- Can support the claim that the information withheld is a trade secret.
- Disclose all other available information about the properties and effects of the toxic substance.
- Disclose the information in the material safety data sheet about the properties and effects of the hazardous chemical.
- Inform the person requesting the information, or the material safety data sheet states that the specific chemical identity is being withheld as a trade secret.
- Make available the specific chemical identity to health professionals, employees, and their designated representatives according to the provisions of this rule.

Nothing in this rule hinders an employer from deleting from records requested by a health professional, employee, or designated representative any trade secret data which discloses manufacturing processes, or discloses the percentage of a chemical substance in a mixture.

You must notify the health professional, employee, or designated representative requesting records that information about the trade has been deleted from the records.

If deleting trade secret information from a record substantially impairs evaluation of the location or the time when exposure to a toxic substance occurred, you must provide alternative information that enables the requesting party to identify where and when the exposure occurred.

[Statutory Authority: RCW 47.17.010, .040, .050. 01-11-038 (Order 99-36), § 296-62-05305, filed 05/09/01, effective 09/01/01.]

WAC 296-62-05310 Reveal trade secret information when it is needed in order to treat a medical or first-aid emergency. When a physician or nurse treating a patient determines that a medical emergency exists and the specific chemical identity of a toxic substance or hazardous chemical is necessary for emergency or first-aid treatment, you must immediately disclose the specific chemical identity of a trade secret chemical to the treating physician or nurse.

You must do this even if you do not have a written statement of need or a confidentiality agreement from the physician or nurse who is handling the medical emergency.

You may require a written statement of need and confidentiality agreement, in accordance with the provisions of nonemergency situations and confidentiality agreement of this rule (see WAC 296-62-05315), as soon as the circumstances of the medical emergency permit.

[Statutory Authority: RCW 47.17.010, .040, .050. 01-11-038 (Order 99-36), § 296-62-05315, filed 05/09/01, effective 09/01/01.]

WAC 296-62-05315 Reveal trade secret information in nonemergency situations when requested by a health professional, employee, or designated representative.

The request by the health professional, employee, or designated representative must:

- Be in writing.
- Describe with reasonable detail one or more of the reasons the information is needed. The reason(s) must be related to occupational health needs, such as to:
 - ◆ Assess the hazards of the chemicals to which employees will be exposed.
 - ◆ Conduct or assess sampling of the workplace atmosphere to determine employee exposure levels.
 - ◆ Conduct preassignment or periodic medical surveillance of exposed employees.
 - ◆ Provide medical treatment to exposed employees.
 - ◆ Select or assess appropriate personal protective equipment for exposed employees.
 - ◆ Design or assess engineering controls or other protective measures for exposed employees.
 - ◆ Conduct studies to determine the health effects of exposure.
 - ◆ Explain in detail why the disclosure of the specific chemical identity is essential.
- Explain why disclosing the:
 - ◆ Properties and effects of the chemical.
 - ◆ Measures for controlling workers' exposure to the chemical.
 - ◆ Methods of monitoring and analyzing worker exposure to the chemical.
 - ◆ Methods of diagnosing and treating harmful exposures to the chemical in lieu of trade secret information would prevent the health professional, employee, or designated representative from providing the occupational health services described in the occupational health needs description.
- Describe procedures to be used to maintain the confidentiality of the disclosed information. The health professional, employee, or designated representative and the employer or contractor of the services of the health professional or designated representative agree in a written confidentiality agreement that the health professional, employee, or designated representative:
 - ◆ Will not use the trade secret information for any purpose other than the health need(s) described; and
 - ◆ Agree not to release the information under any circumstances other than to WISHA, except as authorized by the terms of the agreement or by the employer.

This confidentiality agreement may:

- Restrict the use of the information to the health purposes indicated in the written statement of need.
- Provide for appropriate legal remedies in the event of a breach of the agreement, including a reasonable preestimate of likely damages.
- Not include requirements for the posting of a penalty bond.

If the health professional, employee, or designated representative receiving the trade secret information decides that there is a need to disclose it to WISHA, he or she must inform the employer who provided the information prior to, or at the same time as disclosing it to WISHA.

Nothing in this section is meant to preclude the parties from pursuing noncontractual remedies to the extent permitted by law.

[Statutory Authority: RCW 47.17.010, .040, .050. 01-11-038 (Order 99-36), § 296-62-05315, filed 05/09/01, effective 09/01/01.]

WAC 296-62-05320 Deny a written request for disclosure of a specific chemical identity in the manner specified in this rule.

If you choose to deny a written request for disclosure of information about a specific chemical identity, your denial must:

- Be given to the health professional, employee, or designated representative within thirty days of the request.
- Be in writing.
- Include evidence to support the claim that the specific chemical identity is a trade secret.
- State the specific reasons why the request is being denied.
- Explain in detail how alternative information may satisfy the specific medical or occupational health need without revealing the specific chemical identity.
- If a request for information is denied under the nonemergency section of this rule, the request may then be referred with the written denial of the request to WISHA for consideration.
- When a denial is referred to WISHA, WISHA must consider the evidence to determine if the:
 - ◆ Chemical manufacturer, importer or employer has supported the claim that the specific chemical identity is a trade secret.
 - ◆ Health professional, employee, or designated representative has supported the claim that there is a medical or occupational health need for the information.
 - ◆ Health professional, employee, or designated representative has demonstrated adequate means to protect the confidentiality of the trade secret information.

Potential outcomes of denying a written request for trade secret information:

- If WISHA determines that the specific chemical identity requested under the nonemergency situations section is not a bona fide trade secret, or that it is a trade secret but the requesting health professional, employee, or designated representative has a legitimate medical or occupational health need for the information, has executed a written confidentiality agreement, and has shown adequate means for complying with the terms of such agreement, the chemical manufacturer, importer or employer will be subject to citation by WISHA.
- If a chemical manufacturer, importer or employer demonstrates to WISHA that the execution of a confidentiality agreement would not provide sufficient protection against potential harm from the unauthorized disclosure of a trade secret specific chemical identity, the director may issue such orders or impose such additional limitations or conditions upon the disclosure of the requested chemical information as may be appropriate to assure that the occupational health needs are met without an undue risk of harm to the chemical manufacturer, importer or employer.
- In spite of the existence of a trade secret claim, a chemical manufacturer, importer or employer must upon request, disclose to the director or his representative, any information that this section requires the chemical manufacturer, importer or employer to make available. Where there is a trade secret claim, such claim shall be made no later than at the time the information is provided to the director so that suitable determinations of trade secret status can be made and the necessary protections can be implemented.

[Statutory Authority: RCW 47.17.010, .040, .050. 01-11-038 (Order 99-36), § 296-62-05320, filed 05/09/01, effective 09/01/01.]

WAC 296-62-05325 Understand what is a trade secret. The following is a reprint of the *Restatement of Torts* section 757, comment b (1939):

- b. **Definition of trade secret.** A trade secret may consist of any formula, pattern, device or compilation of information which is used on one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business (see § 759 of the *Restatement of Torts* which is not included in this Appendix) in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for

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example, the amount of other terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of a new policy or for bringing out a new model or the like. A trade secret is a process or device for continuous use in the operations of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

Secrecy. The subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret. Matters which are completely disclosed by the goods which one markets cannot be his secret. Substantially, a trade secret is known only in the particular business in which it is used. It is not requisite that only the proprietor of the business know it. He may, without losing his protection, communicate it to employees involved in its use. He may likewise communicate it to others pledged to secrecy. Others may also know of it independently, as, for example, when they have discovered the process or formula by independent invention and are keeping it secret. Nevertheless, a substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring the information. An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one's trade secret are:

- (1) The extent to which the information is known outside of his business;
- (2) The extent to which it is known by employees and others involved in his business;
- (3) The extent of measures taken by him to guard the secrecy of the information;
- (4) The value of the information to him and his competitors;
- (5) The amount of effort or money expended by him in developing the information;
- (6) The ease or difficulty with which the information could be properly acquired or duplicated by others.

Novelty and prior art. A trade secret may be a device or process which is patentable; but it need not be that. It may be a device or process which is clearly anticipated in the prior art or one which is merely a mechanical improvement that a good mechanic can make. Novelty and invention are not requisite for a trade secret as they are for patentability. These requirements are essential to patentability because a patent protects against unlicensed use of the patented device or process even by one who discovers it properly through independent research. The patent monopoly is a reward to the inventor. But such is not the case with a trade secret. Its protection is not based on a policy of rewarding or otherwise encouraging the development of secret processes or devices. The protection is merely against breach of faith and reprehensible means of learning another's secret. For this limited protection it is not appropriate to require also the kind of novelty and invention which is a requisite of patentability. The nature of the secret is, however, an important factor in determining the kind of relief that is appropriate against one who is subject to the liability under the rule stated in this section. Thus, if the secret consists of a device or process which is a novel invention, one who acquires the secret wrongfully is ordinarily enjoined from further use of it and is required to account for the profits derived from his past use. If, on the other hand, the secret consists of mechanical improvements that a good mechanic can make without resort to the secret, the wrongdoer's liability may be limited to damages, and an injunction against future use of the improvements made with the aid of the secret may be inappropriate.

[Statutory Authority: RCW 47.17.010, .040, .050. 01-11-038 (Order 99-36), § 296-62-05325, filed 05/09/01, effective 09/01/01.]